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JAN 23D, 1940

Supreme Court of the United States

October Term 1939

No. 579

UNION JOINT STOCK LAND BANK OF DETROIT,
Petitioner,

vs.

CARL BYERLY,
Respondent.

On Petition for Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR THE RESPONDENT

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Lima, Ohio.

WILLIAM LEMKE,
Fargo, North Dakota,
Counsel for Respondent.

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(All emphasis in this brief is supplied unless noted otherwise.)

CORRECTIONS

By some inadvertance errors appear in the paging of citations contained in the opinion of the Circuit Court below as printed in the Record at pages 48 to 53. They are here corrected.

Louisville, etc. v. Radford, R. 49, should read *295* U. S. 555 (instead of "293" U. S.)

Thatcher v. Powell, R. 52, should read 19 U. S. *119, 125* (*instead of* "54, 56.")

Voorhees v. United States Bank, R. 52, should read 35 U. S. *449, 473* (*instead of* "298, 316.")

Thompson v. Tolmie; R. 52, should read 27 U. S. *157, 163* (*instead of* "97, 99.")

Elliott v. Peirsoll, R. 52, should read 26 U. S. *328* (*instead of* "248.")

THE APPLICABLE STATUTES

Section 75 (c) (Act of March 3, 1933 11 U. S. C., Section 203 (c)):

> ". . . a petition may be filed by any farmer stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts . . ."

Section 75 (n) (as originally enacted in the Act of March 3, 1933, 11 U. S. C. Section 203 (n)):

> **"The filing of a petition** pleading for relief under this section **shall subject the farmer and his property,** wherever located, **to the exclusive jurisdiction of the court.** In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the court, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed."

On August 28, 1935, when the present Section 75 (s) was enacted, the above Section 75 (n) was amended to read as follows:

Section 75 (n) (Act of August 28, 1935, 11 U. S. C., Section 203 (n)):

> **"The filing of a petition** or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under

Section 75 of this act, as amended, **shall immediately subject the farmer and all of his property,** wherever located, for all the purposes of this section, **to the exclusive jurisdiction of the court, including** all real or personal property, or **any equity or right in any such property,** including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, **the right or the equity of redemption where the period of redemption has not or had not expired,** or where a deed of trust has been given as security, **or where the sale has not or had not been confirmed,** or **where deed had not been delivered, at the time of filing the petition.**

In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute **or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section.** The words 'period of redemption' wherever they occur in this section shall include any State moratorium, whether established by legislative enactment or executive proclamation, or where the period of redemption has been extended by a judicial decree. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary pe-

tition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding the same to the clerk of court."

The following, Section 75 (o), has never been amended:

Section 75 (o) (Act of March 3, 1933, 11 U. S. C., Section 203 (o)):

"Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, **shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:**

(1) **Proceedings for any demand, debt, or account,** including any money demand;

(2) **Proceedings for foreclosure of a mortgage on land,** or for cancellation, rescission, or specific performance of an agreement for sale of land **or for recovery of possession of land;**

(3) Proceedings to acquire title to land by virtue of any tax sale;

(4) **Proceedings by way of execution,** attachment, or garnishment;

(5) **Proceedings to sell land under or in satisfaction of any judgment** or mechanic's lien; and

(c) Seizure, distress, **sale, or other proceedings** under an execution or **under any lease, lien,** chattel mortgage, conditional sale agreement, crop payment agreement, **or mortgage.**"

Section 75 (p) as amended in the Act of August 28, 1935, 11 U. S. C., Section 203 (p):

"(p) The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in Section 75 of this Act."

Section 75 (s) (Act of August 28, 1935, 11 U. S. C., Section 203 (s)):

From the first, unnumbered paragraph of Section 75 (s):

"Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal; or if he feels aggrieved by the composition and/or extension, **may amend his petition** or answer, **asking to be adjudged a bankrupt.** Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged encumbered, or unencumbered, be appraised, and that his unencumbered exemptions and unencumbered interest or equity in his exemptions as prescribed by state law, be set aside to him, and that he be allowed to retain possession, under the supervision and

control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. . . ."

Paragraph (5) of Section 75 (s):

"(5) **This Act shall be held to apply to all existing cases now pending in any Federal Court, under this Act,** as well as to future cases; **and all cases that have been dismissed by any** conciliation commissioner, referee, or **court because of the Supreme Court decision holding the former subsection (s) unconstitutional shall be promptly reinstated,** without any additional filing fees or charges. . . ."

General Code of Ohio, Section 11690:

"Judgment Debtor May Redeem Any Time Before Confirmation.

In sales of real estate on execution or order of sale, at any time before the confirmation thereof, the debtor may redeem it from sale by depositing in the hands of the clerk of the court to which such execution or order is returnable, the amount of the judgment or judgments or decree upon which such lands were sold, with all costs, including poundage, and interest at the rate of eight per cent per annum on the purchase money from the day of sale to the time of such deposit; or, if it is made in vacation, to the first day of the next term, except where the judgment creditor is the purchaser, the interest at such rate on the excess above his claim. The court thereupon shall make an order setting aside such sale, and apply the deposit to the payment of such judgment or judgments or decree and costs, and award such interest to the purchaser, who shall receive from the officer making the sale the purchase

money paid by him, and the interest from the clerk. Nothing in this section shall take away the power of the court to set aside such sale for any reason for which it might have been set aside prior to the enactment hereof. (R. S. Section 5389a.)"

General Code of Ohio, Section 11681.

"Notice of Time and Place.

Lands and tenements taken in execution shall not be sold until the officer causes public notice to be given of the time and place of sale, for at least thirty days before the day of sale, by advertisement in a newspaper printed and of general circulation in the county. The court ordering sale may, in the order of sale, designate the newspaper in which such notice shall be published. (112 v. 261; R. S. Section 5393. Eff. Aug. 9, 1927.)"

THE QUESTION INVOLVED

There was but one legal question involved in the court below. It may be stated thus:

When the District Court disclaimed the farmer debtor's farm on October 22, 1936 (R. 18); (which was adhered to in its order denying the farmer debtor's motion for rehearing on May 6, 1937, R. 34), did the farmer debtor then have a property right in that farm?

Both parties in the court below, and the court below, all agreed that this was the question.

The respondent's brief on appeal to the Circuit Court below as appellant on page 1 reads as follows:

"The legal issue involved here is whether the appellant was divested of his property right in his farm by the sheriff's sale in foreclosure during the pendency of his farmer debtor petition and before the petition had been referred to a conciliation commissioner."

The petitioner here who was appellee in the Circuit Court below said on page 1 of its brief in that court:

> "The one question to be decided upon this appeal is whether the appellant had a property right in the farm when the District Court disclaimed the farm in its order of disclaimer entered October 22, 1936 (Record, page 18)."

The Circuit Court below said in its unanimous opinion (R. 48, second paragraph, last sentence):

> "The issue is: whether appellant had a property right in the farm when the court entered the order of disclaimer, or whether such right had been previously divested, during the pendency of this farmer debtor petition, by sheriff's foreclosure sale prior to reference to a conciliation commissioner with confirmation after such reference."

THE FACTS

Stated within the smallest possible compass the essential facts are:

1. The respondent as farmer debtor filed his petition in the Federal Court under Section 75 (a) to (r) for composition or extension of his debts during the pendency of a foreclosure suit brought by the petitioner here against him and his farm in the State Court and while the sheriff's advertisement of sale was running. R. 1. R. 2, "Schedule 'A'", second item, "Schedule 'B'", first item, and "Statement". See Section 75 (c) at page 2 of this brief.

2. Upon application of the farmer debtor, the district judge issued a restraining order restraining the sheriff and the mortgage holder from conducting the sale. R. 4, top of page.

3. Four days later upon the oral application of the mortgage holder, the petitioner here, the district judge modified the restraining order without compliance with Section 75 (o), by purporting to authorize the sheriff to hold the foreclosure sale but continuing the restraining order against confirmation by the State Court. R. 4-5. The sheriff sold the farm the next day on November 24, 1934. R. 12, 7th and 8th lines from the bottom of the page.

4. Failing to attain composition or extension of his debts under Section 75 (a) to (r) the farmer debtor filed his amended petition under the original Section 75 (s) and was adjudged a farmer debtor bankrupt on February 11, 1935. R. 7-8. See the first unnumbered paragraph of Section 75 (s) at page 5 of this brief.

5. This court on May 27, 1935, in *Louisville v. Radford*, 295 U. S. 555, held the original Section 75 (s), under which the proceedings were pending, to be invalid.

6. On August 26, 1935 (just two days before the President approved the present Section 75 (s) (on August 28, 1935), the proceeding was dismissed because of said decision. R. 8-9.[1]

---

[1]The following is from the opinion of the court below. (See R. 49, third paragraph.) "On May 27, 1935, the Supreme Court declared Sec. 75 (s) unconstitutional (Louisville v. Radford, 295 [295] U. S. 555); and on August 26 thereafter, upon application of appellant, his petition and amended petition were dismissed because Sec. 75 (s) had been found by the Supreme Court to be unconstitutional."

The farmer debtor asserted, and the mortgage holder, the petitioner here, never denied that, " . . . the said Union Joint Stock Land Bank of Detroit represented to him the said Carl Byerly, while his said case was still so pending in this court that unless he, the said Carl Byerly, would dismiss his proceeding in this court, that is his farmer debtor proceeding in this case Number 10984, it, the Union Joint Land Bank of Detroit, would foreclose his mortgage in said Common Pleas Court case pending in Madison County, Ohio, in which said land bank was the mortgagee plaintiff; that he, the said Carl Byerly, relying upon the said representations of the said land

7. As stated in the foregoing paragraph (6), two days after the dismissal of the farmer debtor proceedings the present Section 75 (n) and the present Section 75 (s) became effective on August 28, 1935. Paragraph (5) of the new Section 75 (s) provided that ". . . all cases that have been dismissed by any conciliation commissioner, referee or court because of the Supreme Court decision holding the former subsection (s) unconstitutional shall be promptly reinstated, . . ." (set forth in full at page 6 of this brief).

---

bank and believing that the only way by which the foreclosure of the said land bank's mortgage could be prevented was to have said case Number 10984 in this court dismissed, consented that it might be so dismissed, whereupon his attorney of record in this case Number 10984, filed a motion therein and obtained an order dismissing the same; that thereupon the said the Union Joint Stock Land Bank of Detroit, contrary to the statements and representations made to the said Carl Byerly, proceeded to obtain the consummation of the said sheriff sale of said real estate to it, the said the Union Joint Stock Land Bank of Detroit, accepted the delivery of a deed from said sheriff to it and recorded said deed in the office of the recorder of Madison County, Ohio; the first knowledge of the said sale came to this applicant, Carl Byerly, this week, whereupon he consulted other counsel and for the first time learned that instead of it being necessary to dismiss said case in this court Number 10984 in order to prevent the sale of his real estate in said Common Pleas Court it was the dismissal thereof which allowed said sale to be consummated." R. 9-10, last six lines at bottom of page 9 and remainder of paragraph on page 10.

The opinion of the Circuit Court below, referring to this allegation says: "... appellant on September 24, 1935, applied for reinstatement, rehearsing the above facts, and alleging that he had petitioned for the dismissal entered August 26, 1935 because the Bank had represented that unless he dismissed the proceedings it would foreclose; that, relying thereon and believing that this was the only way foreclosure could be prevented, he consented to the dismissal; that the Bank, contrary to its representations, proceeded to obtain confirmation of the sale to it, accepting the delivery of the deed and recording same; and that it was not until he consulted other counsel that he realized he had paved the way for the confirmation of the sale by the order of dismissal." R. 49-50, last paragraph on page 49 and first four lines on page 50.

In a brief on behalf of the appellant-respondent which was filed in the Circuit Court below on September 16, 1939, the following statement appeared in Note 1 on page 25. The appellee-petitioner filed its brief thereafter on June 9, 1939, without denying or making any reference to said note. The note was as follows: "The statement at R. 10 which was drafted by Mr. Byerly's present counsel (Elmer

8. Twelve days after the new Section 75 (s) became effective, the mortgage holder, the petitioner here, applied to the State Court and secured a purported confirmation of the sheriff's sale which had been conducted during the pendency of the farmer debtor proceedings under Section 75 (a) to (r)\ R. 12, last paragraph.

9. Upon learning that his farm had been sold in foreclosure the farmer debtor applied for reinstatement of his case in the Federal Court pursuant to the new Section 75 (s), and it was reinstated on September 24, 1935. Application for reinstatement, R. 9-10. Statement of the farmer debtor that he had just learned of the sale

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McClain) to the effect that his former attorney (Mr. Troxel) **had filed a motion to dismiss is incorrect.** For this error counsel has no excuse but may offer the following explanation: My first knowledge of the case was obtained when Mr. Byerly came to my office in Lima at 9:30 **Saturday** morning, September 21, 1935. After hearing his story we drove 90 miles to Columbus, arriving a short time before the clerk's office closed at noon. A cursory examination of the file disclosed the order of dismissal (R. 8) which stated that "this matter come on to be heard upon the application of the debtor." From this statement and Mr. Byerly's statement that after the Land Bank threatened to foreclose at once unless he authorized his attorney (Mr. Troxel) to approve an entry of dismissal, he had consented thereto, I concluded that an application for dismissal had actually been filed by the farmer debtor. The "Application for Reinstatement" was prepared in Columbus Saturday afternoon and presented to Judge Hough, who on the same afternoon of Saturday, September 21, 1935, drafted with his own hand the Order of Reinstatement at R. 11, which was entered on September 24. It was not until much later that I learned, after a search for it and for a docket entry on it, that no motion for dismissal had ever been filed by Mr. Byerly.

When there was opportunity to talk to Mr. Troxel, former counsel for Mr. Byerly, after the application for reinstatement had been prepared, presented and allowed (R. 9, and 11), I learned more facts about the order of reinstatement. There had been an agreement between Mr. Troxel and counsel for the Land Bank that if Mr. Troxel should approve the order of dismissal the Land Bank would not seek a confirmation of the sheriff's sale. (R. 20, at 22, paragraph 4.)

Contrary to the promise made to Mr. Byerly and contrary to the agreement with Mr. Troxel, his counsel, the Land Bank obtained a confirmation of the sheriff's sale and took a deed to itself soon after the order of dismissal was entered and after the new subsection (s) requiring prompt reinstatement of all dismissed cases had been enacted."

of his farm, R. 10, last seven lines at end of the paragraph continued over from R. 9.[2] Order of Reinstatement, R. 11.

10. The mortgage holder filed its "Motion to Dismiss the Application for Reinstatement" on November 14, 1935. R. 11. It filed its motion to disclaim the farm from the farmer debtor proceedings on May 8, 1936. R. 12.

11. The District Court's order of disclaimer was entered October 22, 1936, R. 18, which it reaffirmed on Petition for Rehearing on May 6, 1937. R. 34. Motions by the farmer debtor to refer his case to a conciliation commissioner under the new Section 75 (s) were denied. R. 33, 34, 34a, 35 and 36.

---

[2] ". . . the first knowledge of the said sale came to this applicant, Carl Byerly, this week, whereupon he consulted other counsel and for the first time learned that instead of it being necessary to dismiss said case in this court Number 10984 in order to prevent the sale of his real estate in said Common Pleas Court, it was the dismissal thereof which allowed said sale to be consummated."

ARGUMENT

We desire to present our argument in a continuous form and then as our final Point VII to examine the points raised in the brief of the petitioner.

POINT I

The farmer debtor had title to his farm when his proceeding was dismissed because of the holding that the original Section 75 (s) was invalid. R. 8-9. This is true whether the sheriff's sale was valid or void because there had been no confirmation of the foreclosure sale.

POINT II

The sheriff's sale was void because it was conducted while Federal Court proceedings under Section 75 (a) to (r) were pending.

POINT III

The Federal Court order (R. 4) purporting to authorize the sheriff to conduct the sale while proceedings under Section 75 (a) to (r) were pending was likewise void because the procedure prescribed in Section 75 (o) was not observed.

POINT IV

The confirmation by the State Court of the sheriff's sale was ineffective because the void sale could not be confirmed.

POINT V

The State Court did not have jurisdiction when it attempted to confirm the void sale.

POINT VI

An act of a court which is performed while it has no power is a nullity and is subject to attack at any time or place.

POINT VII

An examination of the points presented in the petitioner's brief.

POINT I

The farmer debtor had title to his farm when his proceeding was dismissed because of the holding that the original Section 75 (s) was invalid. R. 8-9. This is true whether the sheriff's sale was valid or void because there had been no confirmation of foreclosure sale.

The Mortgagor's Right of Redemption in Ohio.

In Ohio, by General Code, Section 11690 (printed in full at page 6 of this brief), a mortgagor retains the fee simple title to his mortgaged land, and he has an equity of redemption from foreclosure until confirmation of the sheriff's sale.

In its unanimous decision the Circuit Court of Appeals for the Sixth Circuit, which has jurisdiction over Ohio, in *Hoyd v. Citizens Bank*, 89 Fed. (2d) 105, (at page 107, beginning at the foot of the second column and continuing in the first column on page 108), found that:

> **"The Ohio courts have repeatedly recognized that the equity of redemption includes both the right to redeem and the substantial estate of the mortgagor.** They hold that this estate exists not only from the execution of the mortgage until condition broken, but also between the time of condition broken and of sale. *McArthur v. Franklin*, 16 Ohio St. 193; *Sun Fire Office of London v. Clark*, 53 Ohio St. 414, 42 N. E. 248, 38 L. R. A. 562; *Commercial Bank and Savings Company v. Woodville Savings Bank Co.*, 126 Ohio St. 587, 186 N. E. 444.
>
> **As sale in Ohio is not complete until valid confirmation** (Section 11690, General Code; *Richland County Mutual Insurance Co. v. Sampson*, 38 Ohio

St. 672), **appellant at the time he filed his petition had an equity of redemption consisting of an estate and not of a mere right to redeem. Under Ohio law this constitutes property.**

The equity of redemption in Ohio is a substantial estate subject to dower (*Taylor v. Fowler*, 18 Ohio 567, 51 Am. Dec. 469; *McArthur v. Franklin*, supra); to conveyance and judicial sale (*Childs v. Childs*, 10 Ohio St. 339, 75 Am. Dec. 512; *Hopkins v. Clyde*, 71 Ohio St. 141, 72 N. E. 846, 104 Am. St. Rep. 737, 1 Ann. Cas. 1000), and descendible to the heirs upon the death of the mortgagor (*Bank of United States v. Piatt's Heirs and Adm'rs*, 5 Ohio 540, 541; *Robinson v. Fife*, 3 Ohio St. 551; *Martin v. Alter*, 42 Ohio St. 94, 98). It constitutes a real and beneficial estate descendible by inheritance and only alienable by deed (*McArthur v. Franklin*, supra), and is an insurable interest in land (*Richland County Mutual Insurance Co. v. Sampson*, supra; *Sun Fire Office of London v. Clark*, supra). **If the confirmation of sale is unauthorized or is refused the purchaser at judicial sale obtains no vested right** (24 Ohio Jurisprudence, 79; 27 Ohio Jurisprudence, 727, 728; *Richland County Mut. Insurance Co. v. Sampson*, supra). The latest expression of the Ohio Supreme Court as to the equity of redemption is found in *Commercial Bank and Savings Co. v. Woodville Savings Bank Co.*, supra, which holds that 'The right to rents and profits of real estate follows the legal title. Consequently a mortgagor in possession is entitled to the rents and profits of the real estate, as an incident of possession of the equity of redemption, and they may be collected by such mortgagor until his equity of redemption expires.'

We conclude that as the sale had not been confirmed at the time of filing the petition, appellant's equity of redemption had not been barred, and that it constituted 'property' which was subject to the jurisdiction of the Federal Court under subsection (n). The foreclosure proceedings and the proceedings for sale thereunder were therefore stayed by the operation of subsection (o)."

Consequently it is established that the farmer debtor in this case was in no degree divested of his real estate by the sheriff's foreclosure sale in the State Court even if the sheriff had authority to sell during the pendency of his farmer debtor proceedings in the Federal Court under subsections (a) to (r). **But the sheriff had no power to sell on November 24, 1939, when he attempted to sell the farm in foreclosure.**

POINT II

The sheriff's sale was void because it was conducted while Federal Court proceedings under Section 75 (a) to (r) were pending.

The attempted sale by the sheriff, which was held when proceedings under Section 75 (a) to (r) for composition or extension were pending was void because it was prohibited by Section 75 (n) and (o). Section 75 (n), which is set out in full at page 2 of this brief, reposes exclusive jurisdiction in the bankruptcy court by the general provision that "The filing of a petition . . . under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court."

Section 75 (o), which is also set out in full at page 4 of this brief, specifically prohibited any foreclosure sale

being held. It reads: "**Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings . . . shall not be maintained, in any court or otherwise, against the farmer or his property** at any time after the filing of the petition under this section and prior to the confirmation or other disposition of the composition or extension proposal by the court:" Then follows the designation of foreclosure and other forms of actions which are prohibited.

This Court in its recent decision in *Kalb v. Feuerstein*, which was announced on January 2, 1940, determined that Section 75 (o) is self-executing and mandatory. In the printed decision issued by this Court it is said on page 7, at the end of the unfinished paragraph at the top of the page: "In harmony with the general plan of giving the farmer an opportunity for rehabilitation, he was relieved after filing a petition for composition and extension . . . of the necessity of litigation elsewhere and its consequent expense. This was accomplished by **granting the bankruptcy court exclusive jurisdiction of the petitioning farmer and all his property with complete and self-executing statutory exclusion of all other courts.**"

POINT III

The Federal Court order (R. 4) purporting to authorize the sheriff to conduct the sale while proceeding under Section 75 (a) to (r) were pending was likewise void because the procedure prescribed in Section 75(o) was not observed.

The Congress by statute, Section 75 (n), (o), and (p), having withdrawn all power from the State Court, such **power could be restored only by the Congress which withdrew it.** It did so in Section 75 (o) by making clear,

and exclusive, provision for the restoration of power to the State Court. This provision is that such power may not be restored **"Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, . . ."**

Any method of restoring power to the State Court, which might be attempted, other than that prescribed by the Congress, would be judicial legislation which is prohibited by the Constitution in Article I, Section I, providing that "All legislative powers herein granted shall be vested in a Congress of the United States, . . ." Section 8 of the same Article I provides that "The Congress shall have Power . . . to establish . . . uniform Laws on the subject of bankruptcies throughout the United States; . . ." And in Article VI it states that "This Constitution and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . ." And further that ". . . all judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; . . ."

The District Court's "ORDER MODIFYING RESTRAINING ORDER ISSUED NOVEMBER 19, 1934" (R. 4) was therefore clearly void and ineffective to restore any modicum of power to the State Court.

Federal Court Decisions on the Point.

All Federal Courts which have had to decide whether a federal judge may restore power to a State Court without following the statutory procedure of reference to a conciliation commissioner, hearing by the conciliation commissioner, and report thereon to the judge, have uni-

formly held that he can not do so. It is difficult to understand how it could be otherwise since any other interpretation would defeat the purpose of the law to give the farmer-debtor an opportunity to rehabilitate himself.

Here are presented the decisions of all reported federal cases upon the subject.

1. *In re Wogstad*, 27 ABR NS 363. February 8, 1935, District Court of Wyoming, Judge Kennedy:

"Undoubtedly a bankruptcy court has the jurisdiction and the right to allow a creditor to proceed under the first clause of paragraph (o) but **this would seem to be limited to a petition made to and granted by the judge after hearing and report by the conciliation commissioner.**"

2. *Hoyd v. Citizens Bank*, 89 Fed. (2d) 105. March 12, 1937. Circuit Court of Appeals for the Sixth Circuit, before Hicks, Simons, and Allen, Circuit Judges. Opinion by Judge Allen.

After sale in foreclosure and just before it was to be confirmed the farmer debtor filed his petition under Section 75 (a) to (r). The district judge restrained confirmation of the foreclosure sale but later vacated the injunction upon motion by the mortgagee. The court said: "No hearing has been held before the commissioner, and no report has been made by him to the court. Hence the prerequisites for securing leave of court to proceed with the sale are lacking. Subsection (o) squarely applies and is mandatory" . . . **"The prerequisite to proper dissolution of the restraining order was that a petition shall be made to and granted by the judge after hearing and report by the conciliation commissioner.** Ap-

pellee could have insisted upon a report from the conciliation commissioner; but it took no such action."

3. *Wilcons v. Penn Mutual*, 91 Fed. (2d) 417. July 6, 1937. Circuit Court of Appeals for the Tenth Circuit, before Lewis, Phillips and Bratton, Circuit Judges. Opinion by Judge Lewis.

Foreclosure had proceeded to sale, confirmation and certificates of purchase to the purchasers. The farmer remained in possession but the mortgagees claimed the farmer had no interest in the land. The court held "But if there was good and sufficient reason why the land could not be administered in the bankruptcy court, either because it did not belong to Wilcons or belonged to another at the time the petition was filed, or because Wilcons' interest and right thereto had terminated, then **subsection (o) of Section 75 provides a remedy to the true owner.**" . . . "Whether appellees' names are in or out of the bankruptcy files and proceedings has no effect on the jurisdiction of the bankruptcy court conferred by **subsection (n) which coupled with subsections (o) and (p) operate as an injunction against everyone unless and until lifted in the way provided by subsection (o).**"

4. *Naylor v. Cantley*, 96 Fed. (2d) 761. May 16, 1938. Circuit Court of Appeals for the Eighth Circuit, before Gardner, Sanborn and Thomas, Circuit Judges. Opinion by Judge Sanborn.

In this case two matters were simultaneously pending in the same United States District Court. While a foreclosure suit was pending against a farmer debtor he filed in the same court his petition under Section 75 (a) to (r). Thereafter the foreclosure sale was conducted

by the District Court and confirmed. The mortgagee contended that "since the bankruptcy proceedings and the foreclosure suit were both pending in the United States District Court for the Eastern District of Arkansas, and that since the same judge had both matters in charge, the orders made and the things done by the court sitting as a court of equity are to be regarded as though made or sanctioned by the court of bankruptcy." The court held that "Since under the provisions of Section 75 of the Bankruptcy Act as amended, the court of bankruptcy was, upon the filing of the petition, vested with the sole and exclusive jurisdiction of the debtor and his property, and since that court could not surrender its jurisdiction to any other court, **it was incumbent upon the court of bankruptcy to administer the estate of the farmer debtor in accordance with Section 75** of the bankruptcy Act." The court remanded the proceedings to the District Court to **vacate the foreclosure sale and pay all rents to the conciliation commissioner and to proceed under Section 75.**

5. *Byerly v. Union Joint Stock Land Bank of Detroit*, 106 Fed. (2d) 576. September 18, 1939. Circuit Court of Appeals for the Sixth Circuit, before Hicks, Allen and Hamilton, Circuit Judges. Opinion by Judge Hicks.

This is the instant case now before this court on petition for certiorari. As in the *Hoyd v. Citizens Bank*, (number 2 in this group of cases), the District Court, without following the mandatory provisions of subsection (o), which require reference to the conciliation commissioner and a hearing and report by him, assumed to authorize the foreclosure proceedings to be conducted

while proceedings under Section 75 (a) to (r) were pending.

Upon these facts the court said: "We think that the order modifying the original restraining order to permit the sheriff to proceed with the sale was void. It was made prior to the appointment of a conciliation commissioner and of course prior to any hearing and report by him. The sheriff's sale was an essential step in the proceeding for foreclosure, and the **court was not only unauthorized to allow it but its allowance was expressly prohibited by subsection (o) of Section 75. The order lay without the scope of the court's jurisdiction.**"

There have been a few reported decisions which are sometimes cited as authority not in accord with the decisions just referred to. However, upon examination of the texts of these decisions, it will be found that they may not be so cited. For example: In *Hardt v. Kirkpatrick*, 91 Fed. (2d) 875, CCA 9, the case had passed out of Section 75 (a) to (r) for composition or extension into Section 75 (s) for the three-year moratorium and the court held that Section 75 (o) (printed in full at page 4 of this brief) by its express terms applies only to the period prior to the disposition of the farmer debtor's proposal under Section 75 (a) to (r). Likewise in the case of *In re Clore*, 11 Fed. Supp. 465, decided by the District Court for the Western Division of Kentucky, all proceedings under Section 75 (a) to (r) had been completed and the State Court did not proceed during the pendency under Section 75 (a) to (r). Judge Hamilton, who rendered this Clore decision, was also one of the three Circuit Court of Appeal Judges who heard the

instant case of *Byerly v. Union Joint Stock Land Bank of Detroit*, now before this court on petition for certiorari which held that subsection (o) is mandatory and self-executing.

POINT IV

The confirmation by the State Court of the sheriff's sale was ineffective because the void sale could not be confirmed.

As the State Court was **without power** when the sheriff's sale was conducted such sale was void. The sale being a nullity, no subsequent confirmation could endow it with validity. Some of the authority for these statements follows:

17 Ohio Jurisprudence, "Executions", Section 306: "the sale by the officer under the writ of execution is essential to the title acquired by a person under execution proceedings." (In Ohio foreclosure sales are held "as upon execution".)

24 Ohio Jurisprudence, "Judicial Sales", Section 4: "An order, judgment or decree of sale by a court without jurisdiction is void and not merely voidable. As a logical consequence the sale based thereon is likewise an absolute **nullity.** The rule is equally applicable whether the lack of jurisdiction has reference to the subject matter or to the person. So a void judgment, order or decree, in whatever tribunal it may be entered, is, in legal effect, nothing. All acts performed under it, and all claims flowing out of it are void. Hence a sale based on such judgment has no foundation in law; it must fall. Judicial proceedings are void when the court wherein they take place is acting without jurisdiction."

Freeman on Judicial Sales, Sections 23, 42: "A void judgment, order or decree, in whatever tri-

bunal it may be entered, is, in legal effect, nothing. All acts performed under it, and all claims flowing out of it, are void. Hence a sale based on such judgment has no foundation in law; **it must certainly fall."**

Upon the filing of Mr. Byerly's petition under Section 75 **the jurisdiction of the Common Pleas Court was from then on as nonexistent as if its decree of sale had been issued when it had no jurisdiction.** Whether a sheriff's sale be void for lack of an order of sale to support it, or by express prohibition of the supreme law of the land under the bankruptcy power, in either event, **the sheriff is without power to act, and his act is a mere nullity.** Therefore, the sale conducted by the sheriff while his court had no jurisdiction "must certainly fall" —no right could accrue from it. Confirmation of the **"nullity"** can not cause it to convey title. Restoration of jurisdiction to his court after he had presumed to conduct a void sale could not impart validity to his void act.

4 Jones on Mortgages, Eighth Edition, Section 2099, (old numbering 1633), page 579:

"A sale under a foreclosure decree is void if conducted in a manner which would not have been in the power of the court to authorize."

Wiltzie on Mortgages — Foreclosure, Fourth Edition, Section 735: "But **confirmation will not make good a defect arising from a want of jurisdiction in the court, . . .**"

16 Ruling Case Law, "Judicial Sales", Section 3, Page 8: "And it is even beyond the power of the legislature to validate by retroactive legislation a judicial sale of real estate which was void for want of jurisdiction in the court to make it, at least without making provision for compensation to the owner of the property."

16 Ruling Case Law, "Judicial Sales", Section 19, Page 25: "A **sale made by an officer acting without such authority must be treated as a nullity, even though it be subsequently ratified by the court.** Purchasers at a judgment sale are protected when the power to make the sale is expressly given, not otherwise." "Furthermore, **an original lack of authority cannot be supplied at a later stage in the proceedings in such a manner as to validate the sale by relation.** Thus a sale by a trustee, not authorized to sell under a decree though reported to the court and ratified and confirmed by it after public notice, must be treated as a nullity. In such a case ratification does not bring the sale within the rule which applies where the court has jurisdiction but has committed an error in its proceedings. **The sale being without authority, ratification of it by the court** must be considered as given inadvertently; or if given deliberately and on a full examination of all the facts, still it **must be regarded as unauthorized and void.**"

42 Corpus Juris, "Mortgages", Section 1864, Page 227: **"Confirmation cures all defects and irregularities excepting those which would make the sale absolutely void, such as want of jurisdiction."**

The Supreme Court of Ohio has always supported the doctrine of the texts which have just been quoted. Some instances follow:

Ludlow v. Johnston, 3 Ohio 553, 577, (1828). An action of ejectment was defended by showing a sale conducted when the court had no jurisdiction. The court said: **"When jurisdiction over any particular subject is withdrawn from a court, the effect is the same as to that subject, as if the court**

itself was abolished." "Neither can a court, after any particular jurisdiction has been withdrawn from them, by a similar entry correct any mistake or error which may have been committed while they possessed the jurisdiction, although the same court continues in existence, and possesses jurisdiction over other subject."

Beal v. King, 6 Ohio 11 (1833). After judgment was rendered a writ of execution and levy was issued which was invalid. Subsequently a valid order of sale was issued and upon it sale was made and confirmed. In an independent case the court held the sale to be void. The opinion at page 13 says, "The valid *vendi* does not supply the defect of the original *fi fa et lev. fa.* The predicate of the *vendi* is a previous valid writ of *fi fa et lev. fa* and a valid levy upon it."

Morgan v. Mason, 20 Ohio 401, at 408 (1851). The issue was whether plaintiffs obtained title in a former case through a deed delivered by a sheriff after levy, and sale, **which had been confirmed by the court.** The court said: "Without a judgment, levy, and sale, the sheriff possesses no more power or authority to convey the lands of a debtor, than any private person; and consequently without those indispensable requisites, can give no better title to them.

Bassett v. Daniels, 10 O. S. 617, 619 (1858). Judge Swan said that the purchaser takes no title and there is no authority to make a deed until it is "judicially determined that the sale has been legally made."

Stites v. Wiedner, 35 O. S. 555 (1880). The court confirmed a sale in foreclosure of a certain "lot two" which had been decreed to be sold but was omitted from the sheriff's appraisement and a

deed was delivered to the purchaser. In a subsequent action brought by the mortgagor, his title was cleared thus holding the **sale of "lot two" to have been void although it had been confirmed.**

Reed v. Radigan, 42 O. S. 292 (1884). Before there was any statutory right to redeem the sheriff sold lands in foreclosure, all proceedings being regular. A statute provided that if the sale was made in conformity to the statute, the clerk "shall be directed" by the court to make an entry that the sheriff made a deed. After sale was completed the debtor paid the debt. The Court held that notwithstanding the regularity of the proceedings and the mandatory provisions requiring confirmation, the confirmation should be set aside. **The payment of the judgment deprived the court of all power to confirm the sale.**

Hurst v. Fisher, 64 O. S. 530 (1901). **After confirmation of sale, delivery of deed and distribution of the purchase price,** the owner brought an independent action to set the sale aside, on the ground that purchase by an appraiser was void. The sale was set aside. Here there was a valid order of sale but, as in the Byerly case, **the sale was void for a reason extraneous to the physical conduct of the sale.** In the Hurst case it was the purchase by the appraiser; in the Byerly case it was the supreme law of the land expressed in subsections (n) and (o), which **deprived the sheriff of power.**

It seems to be clearly demonstrated that the sale in foreclosure proceedings is a separate and essential function of the court and not merely an incident which may be disregarded. **Foreclosure can not be completed without a sale.** This sale by the sheriff was a nullity and its confirmation could not give it force.

POINT V

But the State Court did not have jurisdiction when it attempted to confirm the void sale.

On August 24, 1935, the present Section 75 (s), being a part of Senate Bill 3002, was presented to the President for signature. See Congressional Record, 74th Congress, 1st Session, Pages 15037-15038. Report of Mrs. Caraway from the Committee on Enrolled Bills.

On August 26, 1935, two days later, Mr. Byerly's proceedings were dismissed because the original subsection (s) had been held invalid. R. 8.

On August 28, 1935, the President approved Senate Bill 3002 containing Section 75 (s). See Public Document, No. 384, 74th Congress.

On September 10, 1935, the petitioner, The Union Joint Stock Land Bank of Detroit, the mortgage holder which had bid in the land at the void foreclosure sale conducted by the sheriff, procured the State Court to confirm the sale. It recorded its deed from the sheriff on the following day. R. 12, last ten lines.

The new Section 75 (s) so enacted on August 28, 1935, in paragraph (5) contained the provision that "... all cases that have been dismissed by any ... court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, ..." Printed in full at page 6 of this brief.

We think that on August 28, 1935, the United States had reasserted its authority and jurisdiction over the real estate of Mr. Byerly so that the State Court had no power over it.

We think also that the mortgagee-purchaser, the Union Joint Stock Land Bank which is petitioner here,

took the confirmation and deed subject to the paramount authority of the United States over the real estate. As in *Wayne v. Owens-Illinois*, 300 U. S. 131, the mortgagee-purchaser at the foreclosure sale went ahead in the state case knowing that the jurisdiction of the United States Court might be invoked, in fact it knew—as all men must know the law—that thirteen days before it procured confirmation and took its deed, the United States had asserted jurisdiction. On September 24, 1935, the District Court actually formulated the expressed statutory declaration of jurisdiction by reinstating the case. R. 11. At page 135 of the opinion of the court in *Wayne v. Owens-Illinois*, 300 U. S. 131, this court said:

> "The respondents went forward with the proceedings in the State Court, looking to a sale of the debtor's property, with full knowledge that a rehearing might be granted and that the order entered thereon might be appealed. They are not entitled, therefor, to rely on any status acquired in the State Court suit as precluding further consideration of the petition for reorganization."

POINT VI

An act of a court which is performed while it has no power is a nullity and is subject to attack at any time or place.

It was not necessary that the farmer-debtor should notice or contest in any way the act of the state court in conducting sale or in confirming it. It was said by this court in *Kalb v. Feuerstein*, decided January 2, 1940 (at page 7, last paragraph of the printed opinion issued by this court) that

> "Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer-debtor. The protection of the farmers was left to the farmers themselves or to the commissioners who might be laymen, and considerations as to whether the issue of jurisdiction was actually contested in the county court, or whether it could have been contested, are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this Act."

The jurisdiction and power of every court to act in any case may be examined by any court in any case at any time. It is only when a court acts within its jurisdiction that its decisions and orders are immune from collateral attack. When acting within its jurisdiction any error or irregularity must be remedied exclusively by appeal.

Precisely the same argument of *res adjudicata* that is followed by the petitioner here was presented to this Court in *Wright v. Union Central*, 304 U. S. 502, and swept aside. The question was whether the property right of the farmer debtor had been divested by the state law. The opinion of this Court at page 507 says:

> "A judgment overruling a defense grounded on the bankruptcy proceedings and awarding possession and damages to the respondent, was affirmed by the Supreme Court of Indiana on April 2, 1937. *Wright v. Union Central*, 7 N. E. (2d) 208. A similar judgment with respect to the rest of the land was affirmed October 26, 1937, *Wright v. Union Central*, Ind. Sup. 10 N. E. (2d) 726."

Beginning at the last paragraph on page 517 this Court said:

"Respondent argues that to subject property bought in at foreclosure sale, to the extended redemption period and other provisions of Section 75 (s) 'would be a direct invasion of the powers reserved to the state by the Constitution, and a violation of [respondent's] property rights theretofore determined by the courts of the State of Indiana in accordance with the law of that State. If the argument is that Congress has no power to alter property rights, because the regulation of rights in property is a matter reserved to the states it is futile. Bankruptcy proceedings constantly modify and affect the property rights established by state law." At page 518, first paragraph: "Property rights do not gain any absolute inviolability in the bankruptcy court because created by state law."

The following cases also illustrate the principle that the jurisdiction and power of all courts is subject to examination in any court and if found lacking the action of the court will be regarded as a nullity.

Elliott v. Peirsol, 26 U. S. (1 Pet.) 328, 340 (1828). Action of ejectment in a Federal Court. The title of the defendant depended upon a certificate of acknowledgment ordered to be recorded by a State Court: The opinion says at page 340:

"It is argued that the Circuit Court of the United States had no authority to question the jurisdiction of the County Court of Woodford County; and that its proceedings were conclusive upon the matter whether erroneous or not. We agree that if the county court had jurisdiction, its decision would be conclusive. But we cannot yield an assent to the proposition that the jurisdiction of the county court could not be questioned, when

> its proceedings were brought collaterally before the Circuit Court. We know of nothing in the organization of the Circuit Courts of the Union which can contradistinguish them from other courts in this respect . . . the jurisdiction of any court exercising authority over a subject matter may be enquired into in every court when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings."

Thus a void act of the court's agent could not be legalized and made to pass title by the court.

Thompson v. Tolmie (1829), 27 U. S. (2 Pet.) 157, 163:

> **"If there is a total want of jurisdiction, the proceedings are void** and a mere nullity, and confer no right, and afford no jurisdiction, and may be rejected when collaterally drawn in question."

As was said in 1836 by this Court in *Voorhees v. Jackson*, (ex dem. *United States Bank*), 35 U. S. (10 Pet.) 449 at page 473, even the "most solemn proceedings" of this Court "can confer no right which is denied to any judicial act under color of law" if not warranted by the constitution or by the law of the land. The court said, beginning at the bottom of page 474:

> "The line which separates error in judgment from the usurption of power is very definite, and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case it is a record importing absolute verity; in the other, **mere waste paper.**"

In this case of *Voorhees v. Jackson*, ejectment was brought in a Federal Court against a defendant who justified his title through prior sale in attachment proceedings in a State Court. This court held that if there had been procedural irregularity, the jurisdiction of the State Court was not involved and that **proceedings within a court's jurisdiction cannot be attacked collaterally in another court** (page 471).

Nine years later *Gaultley v. Ewing*, 44 U. S. (3 How.) 707, presented the same principle where there was not mere procedural irregularity but **lack of power in the court to act.** The facts were as follows: Foreclosure proceedings were completed in a state court by sheriff's sale, the land was purchased by a stranger, and the deed was delivered to him. Later ejectment was brought in the Federal Court in an independent case on the ground that the sheriff's sale was void because the Indiana law required rents and profits first to be offered before selling the real estate. This Court held the purchaser acquired no title because **the sheriff had no power to sell.** Answering the argument that the purchaser did not know the sheriff had not first offered the rents and profits this Court said: "This is a **question of power,** and the answer to the suggestion rests on this: The sheriff's duties are plainly prescribed; **if he has no power to sell, want of knowledge on the part of the purchaser could not confer it, and no such contingency can be let in to help his deed.**" In this Byerly case, it was the federal statute which deprived the sheriff of power. Thus confirmation did not enforce a void sale.

Hickey v. Stewart, 44 U. S. (3 How.) 750 (1840). The defendant was in possession of lands by writ of possession issued from a state court. Ejectment was brought in a Federal Court. After quoting with approval several of its decisions this Court held that **the State Court had no jurisdiction and its "whole proceedings is a nullity."** It reversed the lower Federal Court for allowing the record of the State Court proceeding to be put in evidence. Confirmation of void proceedings did not pass title.

Thatcher v. Powell, 19 U. S. (6 Wheat.) 119, concerned an action of ejectment in a Federal Court. The defendant relied upon State Court proceedings which the plaintiff claimed were void. The opinion at page 125 reads: **"That no individual or public officer can sell and convey a good title to the land of another, unless authorized so to do by express law, is one of those self-evident propositions to which the mind assents, without hesitation,** and that the person invested with such a power must pursue with precision the course prescribed by law or his act is invalid, is a principle which has been repeatedly exercised in this court."

In the case of *Mitchell v. St. Maxent*, 71 U. S. (4 Wall.) 237, ejectment was brought in the Federal Court against a defendant in possession who claimed under judgment of the State Court. It was asserted that the Federal Court could not examine into the proceedings of the State Court. This Court said in the first paragraph of its opinion that "It is a well-settled principle of law which has often received the sanction of this Court, that the decree or judgment of a court having jurisdiction is binding till reversed, and can not be collaterally attacked,

But the defect in this case occurs after the judgment, and is fatal to Mitchell's title, for purchasers at a judicial sale are not protected, if the execution on which the sale was made was void. **Void process confers no right on the officer to sell, and all acts done under it are absolute nullities.**" The officer who presumed to sell had no power and could convey no title.

Shriver v. Lynn; 43 U. S. (2 How.) 43. A trustee under a state court sold land over which the court had no jurisdiction and the court confirmed the sale. The original owner brought ejectment in a Federal Court. The defense in the Federal Court was the sale confirmed by the State Court. This Court said:

> "The validity of the sale then, must rest upon the fact of its having been made by the trustee and sanctioned by the chancellor. There would seem to be no ground for doubt on this point." **"The sale being without authority, the ratification of it by the court must be considered as having been given inadvertently.** If given deliberately and on a full examination of all the facts, still **it must be regarded as an unauthorized proceeding.** There was no case before the court—nothing on which its judgment could rest. **No court,** however great may be its dignity, **can arrogate to itself the power of disposing of real estate without the forms of law.**"

The foregoing authorities show that the acts of every court, and of its agent, are subject to examination in another court when jurisdiction or power is questioned. The Federal Courts in collateral proceedings unhesitatingly hold void the acts of State Courts.

POINT VII

An Examination of the points presented in the petitioner's brief.

Having presented the applicable law as we understand it, we will now consider the arguments and cases relied upon by the petitioner.

Petitioner's Brief, Page 16, Argument I.

Respondent's answer to Argument I of Petitioner's Brief which reads: "The order of the District Court modifying the restraining order and permitting the sale, but restraining confirmation, transfer of title and delivery of deed was within the power and discretion of the District Court R. (4)."

We think we have conclusively demonstrated at pages 17 to 23 of this brief under our Point III that the mandatory "complete and self-executing statutory exclusion of all other courts" in Section 75 (n), (o) and (p) precluded the District Court from modifying the effect thereof **"Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, . . ."** The first quotation is from the opinion of this Court in *Kalb v. Feuerstein*, decided January 2, 1940. The second is from Section 75 (o).

Petitioner's Brief, Page 20, Argument II.

Respondent's answer to Argument II of Petitioner's Brief which reads: "The order of the District Court modifying the restraining order and permitting the sale, not excepted and not appealed from, became *res adjudicata* and binding upon the respondent."

First Answer: The order of the District Court was void, no appeal was necessary. The District Court

did not have jurisdiction of either person or property of the farmer debtor except as conferred by Section 75 and the jurisdiction there conferred did not include jurisdiction to restore power to the State Court in any other manner than by the procedure prescribed by Section 75 (o), which prohibits it **"Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner,. . ."** Point III of this brief presented at pages 17 to 23 herein, and Point VI presented at pages 29 to 35 herein, we think fully answer the petitioner's Argument II.

Second Answer: No appeal was possible. The order was issued *ex parte* "upon the oral application" of the mortgagee, "it appearing the applicant has already been put to considerable expense in preparing for sale" and "that debtor will not be prejudiced by permitting the said property to be sold providing confirmation be not had." R. 8, bottom of page. The debtor had neither notice nor knowledge of its issuance. In addition to such an order being wholly void for lack of power in the court to issue it, it was void because the debtor did not have his day in court; it did not accord to him due process of law, as required by the Fifth and Fourteenth Amendments.

We will here consider the cases cited by the petitioner under its Argument II.

McWilliams v. Blackard, 96 Fed. (2d) 43, cited on page 20 of petitioner's brief. Every procedure in the McWilliams case occurred AFTER the present subsection (s) was enacted on August 28, 1935, the petition under Section 75 (a) to (r) having been filed two months thereafter. The Circuit Court of Appeals held the present

subsection (s) to be unconstitutional and directed dismissal of the proceedings. Thereafter this Court held it to be constitutional. Upon these facts the District Court reinstated the amended petition relying upon paragraph (5) of the present subsection (s), which reads: ". . . all cases that have been dismissed . . . because of the Supreme Court's decision holding the **former** subsection (s) unconstitutional, shall be promptly reinstated. The Circuit Court reversed the District Court for the reason that the clause just quoted from the subsection (s) refers not to cases dismissed under the present subsection (s) but, as it said, to the "**former** subsection (s)." No question of state or federal jurisdiction or power was involved. No state court was involved. No question of conflict of jurisdiction was in the case. The Federal Courts had power and jurisdiction and only the Federal Courts acted. The decision of the Circuit Court was final because not appealed. It became the "law of the case.".

Minneman v. Federal Land Bank, 105 Fed. (2d) 363, cited on page 21 of petitioner's brief.

The petitioner again fails to distinguish between the decision or act of a **court having power** and the decision or act of a **court having no power**. The District Court in the present Byerly case had no power to authorize the State Court to sell. The State Court had no power to sell and therefore Mr. Byerly's property rights were never divested. In the *Minneman* case as in the *McWilliams* case the Federal Courts had power to declare an act of Congress unconstitutional even though the subsequent decision of this Court in *Wright v. Vinton* rendered the earlier decisions of the lower Federal Courts erroneous. The Court said in the Minneman opinion: "The

courts early distinguished between the effect of void and voidable orders." At the close of the opinion it said: "Since we hold that there were no proceedings pending to be reinstated upon amendment of Section 75 (s), it is unnecessary for us to discuss this proposition." Had the petitioners appealed from the erroneous decisions of the District Courts, which they did not do, the erroneous decisions would not have become final. Having become final and the courts having had power to render them, the final orders were *res adjudicata* and were not subject to collateral attack.

Petitioner's Brief, Page 23, Argument III.

Respondent's answer to Argument III of Petitioner's Brief which reads: "Abandonment by respondent of proceedings under Section 75 (a) to (r) of the Bankruptcy Act by the filing of his amended petition under original Section 75 (s) followed by a dismissal of the entire proceedings under Section 75, upon the application of respondent, rendered such proceedings nugatory, constituted a waiver of all irregularities which might have occurred while said proceedings were pending and estopped and precluded the respondent from thereafter objecting to such irregularities."

We think that the petitioner's Argument III entirely misconceives the nature of Section 75. The respondent did not abandon his proceedings under Section 75 (a) to (r). He fully completed them and naturally progressed into the original Section 75 (s), all according to statutory procedure. The proceedings under Section 75 (a) to (r) were terminated by the provisions of the law itself and thus ceased to exist. There was nothing to abandon or to dismiss. The proceedings were not nugatory—they had

fully accomplished their purpose of affording to the farmer-debtor an opportunity to seek a composition or extension and the act itself provided for the situation where composition or extension was not accomplished. The act of the District Court in presuming to authorize the State Court to sell in foreclosure contrary to Section 75 (n), (o) and (p) was not a mere "irregularity", it was a "nullity" because the court had no power to do it and therefore the sale was a "nullity" also.

As to the claim of the petitioner that the order of dismissal was "upon application of the debtor" we believe we have quite sufficiently established the uncontradicted misrepresentation of the petitioner upon which it was based and the finding of the court below at pages 9, 10 and 11 of this brief in the second and third paragraphs of Note 1.

Harrison v. Remington, 140 Fed. 385; *Viviano v. Ferguson*, 39 S. W. (2d) 568; and *Piukkula v. Pillsbury*, 42 P. (2d) 921, cited at page 24 of the petitioner's brief are likewise wholly inapplicable. They refer to the general law while we are here concerned with a specific statutory provision under a specific constitutional grant of power. Nothing has occurred in Mr. Byerly's case to render any part of the provisions of Section 75 (a) to (r) ineffective as to the proceedings thereunder. He filed his petition under Section 75 (a) to (r) and thereby brought Section 75 (n), (o) and (p) into effect. Neither a party, nor a court, may dismiss a proceeding that has fully run its course and terminated.

Petitioner's Brief, Page 25, Argument IV.

Respondent's answer to Argument IV of Petitioner's brief which reads: "The so-called sale in the State Court did not change the legal status of the debtor or

his property as he still retained the identical right of redemption secured to him by the provisions of Ohio G. C. Section 11690 up to the time of confirmation by the State Court which occurred after the Bankruptcy Court had lost jurisdiction by the dismissal of the bankruptcy proceedings."

1. We must agree that "the so-called sale in the State Court did not change the legal status of the debtor or his property," because we think, as a legal proposition, it was an utterly void gesture. We have discussed this subject under Point II of this brief beginning at page 16.

2. But as a practical matter it has been of momentus significance to the respondent for because of it he has been put off of his farm and lost the use of it for nearly five years while the petitioner enjoys the use and occupation of it.

3. However if we take it as no doubt the petitioner wishes to be understood, we must say that the law of Ohio requires a foreclosure sale to be advertised for five successive weeks over a period of **thirty days** before the date of sale. (The state statute is shown at page 7 of this brief.) The petitioner procured the State Court to confirm the void sale **within less than thirty days** from the day it procured the order of dismissal from the District Court. Before thirty days had elapsed the same District Court had reinstated the case. Therefore if the petitioner had not had the attempted sale to depend upon it could not have persuaded the State Court to issue a decree of confirmation.

4. This situation is one of many illustrations of the wise purpose of the Congress in enacting Section 75

(o), which puts a stop to all proceedings of every court except those in the court of bankruptcy for composition or extension while they are pending. **Were it not for subsection (o) it would be legal for the mortgage holder, as here, to creep up on the farmer debtor while farmer-debtor proceedings were pending, and pounce upon him at the first moment they were completed and before he could invoke Section 75 (s).** Mr. Byerly, the farmer debtor, had no knowledge that his farm had been sold on November 24, 1934, until ten months thereafter when he learned of the confirmation and the deed from the sheriff to the petitioner. ". . . the first knowledge of the said sale came to this applicant, Carl Byerly, this week [of September 21, 1935]". Quoted from R. 9-10, ~~1st~~ six lines at bottom of page 9 and remainder of paragraph on page 10. Also set out at page 10 of this brief in the second paragraph of Note 1.

Petitioner's Brief, Page 27, Argument V.

Respondent's answer to Argument V of Petitioner's brief which reads: "The State Court had exclusive jurisdiction of the parties and subject matter when the decree of confirmation was entered and its decree cannot be collaterally attacked in this proceeding."

We are of the opinion that the State Court had no jurisdiction whatever of either the farmer debtor or of his property when it decreed confirmation of the void sale. This has been discussed in Point V of our Argument at pages 28-29 of this brief.

We are of the further opinion that even if the State Court had jurisdiction of the property when it confirmed the void sheriff's sale, such confirmation was a nullity because a void sale may not be confirmed by any court

any more than it could grant a divorce without a hearing or award damages without a trial. The Constitution by the Fifth and Fourteenth Amendments forbid that any person be deprived of his property without due process of law. Due process of law requires a valid sale before confirmation and deed.

As this Court said in *Shriver v. Lynn*, 43 U. S. (2 How.) 43 (quoted at page 35 of this brief), where there were two confirmations by a State Court of a void sale: "The sale being without authority, the ratification of it by the court must be considered as having been given inadvertently. If given deliberately and on a full examination of all the facts, still it must be regarded as an unauthorized proceeding. **There was no case before the court—nothing on which the judgment could rest.**"

In the following cases, sales of real estate in State Courts were held nugatory by the Federal Courts in independent actions without appeal from state to federal courts.

Gantley v. Ewing, 44 U. S. (3 How.) 707 (see page 33 of this brief.)

Hickey v. Stewart, 44 U. S. (3 How.) 750, (see page 34 of this brief.)

Thatcher v. Powell, 19 U. S. (6 Wheat.) 119, (see page 34 of this brief.)

Mitchell v. St. Maxent, 71 U. S. (4 Wall.) 237 (see page 34 of this brief.)

Boswell v. Otis, 50 U. S. (9 How.) 336.

Shriver v. Lynn, 43 U. S. (2 How.) 43, (see page 35 of this brief.)

The decisions cited by Petitioner under the heading of Argument V, pages 28 to 35, will be here examined.

Robertson v. Howard, 229 U. S. 254, cited at page 28 of Petitioner's brief. This case originated in a bankruptcy court where a referee confirmed a sale of real estate in bankruptcy. Section 75 was not involved. The Supreme Court of Kansas held the sale to be void because the general federal statutes prescribing sale procedure had not been observed. This Court reversed the Kansas Supreme Court for the reason that sale in bankruptcy courts are regulated by the bankruptcy law which gave the referee discretionary power as to the conduct of sales. The referee had full power.

Thompson v. Tolmie, 2 Pet. 157 (27 U. S. 157), cited at page 29 of Petitioner's brief, has been discussed at page 32 of this brief. We deem it sufficient to suggest that in this case this court discussed the general rule governing collateral attack in two classes of situations. First, where a court has power. Second, where it had no power. In this case the court had power—and this court applied the rule. In *Gantley v. Ewing*, 44 U. S. (3 How.) 707, nine years later (discussed at page 33 of this brief) the court had no power—and this court applied the rule.

Hall v. Law, 102 U. S. 461, cited at page 29 of Petitioner's brief, presents the same principle where the court had power and this court applied the general rule.

Briscoe v. Rudolph, 221 U. S. 547, cited at page 29 of Petitioner's brief, was another case where the court had power and this court applied the rule.

Grubb v. Public Utilities, 281 U. S. 470, cited at page 30 of Petitioner's brief. In the State Court (119 Ohio State Reports 264), an application for an interstate motorbus certificate was denied because a "loop route" from Portsmouth, Ohio, across the river to the Kentucky

side and return was held to be only colorable for the purpose of doing intrastate business. An original suit was brought in the United States Court and appealed to this Court. The only federal question involved was whether the commerce clause committed to Federal Courts exclusive jurisdiction of all suits relating to regulation of interstate commerce. The Court said (bottom of page 475): "This view of that clause is quite inadmissable. It has no support in any quarter and is at variance with the actual practice in this class of litigation." The court held that the state and federal courts have concurrent jurisdiction. The State Court had power.

Southern Pacific v. United States, 168 U. S. 1, cited at page 31 of Petitioner's brief is another instance where the court had power and this court applied the rule.

Mitchell v. First National Bank, 180 U. S. 477, cited at page 31 of Petitioner's brief, followed the decision in the preceding Southern Pacific case because in it also the court had power.

Pepper v. Litton, — U. S. —; 60 S. Ct. 238, (decided by this court December 4, 1939), cited at page 31 of Petitioner's brief, holds that a bankruptcy court may determine the validity of a claim reduced to judgment in a State Court. Under its bankruptcy power a court of bankruptcy may go behind that judgment and examine the claim sued on. It is somewhat amusing that in the Circuit Court below the petitioner cited the decision of the Circuit Court of Appeals for the Fourth Circuit and relied upon it there, while in this court it cites and relies upon this court's decision reversing it.

Prebyl v. Prudential, 98 Fed. (2d) 199, cited at page 32 of Petitioner's brief did not involve Section 75 but the Bankruptcy Law of 1898. The sole question was whether a mortgage lien, placed upon real estate six years before the mortgagor was adjudged a bankrupt was discharged by the discharge of the bankrupt. Now the general bankruptcy law does not discharge liens which have attached more than four months preceding bankruptcy. (Section 67.) The opinion states that "On proper application an order was entered in the bankruptcy court authorizing the mortgagee to foreclose its mortgage." While the foreclosure was proceeding in the State Court the bankrupt in due course received his discharge. He then went into the State Court and opposed confirmation of the foreclosure sale on the ground that his discharge in bankruptcy also discharged the lien on the real estate that was being foreclosed. When the State Court decided against him he raised the same question in the Federal Court. In its decision the Federal Court said although it had no doubt of the correctness of the decision of the State Court yet it would put its decision upon the ground that the issue was conclusively settled in the State Court and could not be retried in the Federal Court. The decision followed the rule that as the State Court had exclusive jurisdiction of the subject matter and of the person, its judgment could not be collaterally assailed in any other court.

Montgomery v. Equitable, 83 Fed. (2d) 758, cited at page 32 of petitioner's brief, was another instance of complete power in a court to render a judgment free from collateral attack.

In re 7000 South Shore, 86 Fed. (2d) 499, cited at page 33 of Petitioner's brief, involved Section 77B of the Bankruptcy Act for the rehabilitation of corporations. In 1930, four years before Section 77B was enacted, a foreclosure suit had been filed and a receiver appointed in a state court. Also before Section 77B was enacted the State Court allowed the account of the receiver. Thereafter the 77B proceedings were filed in the Federal Court. The Federal Court of Appeals held that "the State Court had jurisdiction of the parties and the subject matter" and that "the subject matter and the parties being before the court and the issue submitted on proper pleadings, we may not enquire as to the wisdom of the order." The State Court had exclusive jurisdiction and rendered judgment long before Section 77B was enacted.

Rishol v. McPherson, 34 Fed. (2d) 250, cited on page 33 of Petitioner's brief; *Jack v. Hood*, 39 Fed. (2d) 594, cited on page 34; *Gordon v. Ware*, 132 Fed. 444, also cited on page 34, and *Wright v. Schick*, 134 Ohio State, 193, also cited on page 34 of the Petitioner's brief, are all instances of complete power in a court to render a decision which is free from collateral attack.

In concluding the discussion of this Point V of the Petitioner's argument, may it be suggested that no instance will be found in United States federal jurisprudence where a Federal Court is precluded by a judgment of a State Court from adjudicating a question arising out of exclusive federal jurisdiction. *Wright v. Union Central*, 304 U. S. 502, and *Kalb v. Feuerstein*, — U. S. —, (decided January 2, 1940, by this Court) clearly illustrate this statement.

Petitioner's Brief, Page 36, Argument VI.

Respondent's answer to Argument VI of Petitioner's brief which reads: "The case of *Hoyd v. The Citizens Bank of Albany Company,* 89 Fed. (2d) 105, decided by the Circuit Court of Appeals, Sixth Circuit, March 12, 1937, and relied on by said court in its opinion in the instant case (R. 48) is clearly distinguishable upon its facts."

We submit there is no substantial difference between the case of *Hoyd v. Citizens Bank,* 89 Fed. (2d) 105, discussed at page 19 of this brief, and that of *Byerly v. Union Joint Stock Land Bank,* 106 Fed. (2d) 576, which is the subject of the pending petition for certiorari.

1. It seems that the petitioner asserts that an entire violation of Section 75 (o) should be reversed while a little violation of it should be commended and affirmed. Section 75 (o) reads: ". . . the following proceedings . . . shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition. . .; Proceedings for foreclosure of a mortgage on land . . .; Proceedings by way of execution . . .; Proceedings to sell land under or in satisfaction of any judgment . . . ; sale or other proceedings under . . . any . . . mortgage." This statute is inclusive, mandatory, and self-executing. It contains the sole authority for the modification of its provisions "upon petition made to and granted by the judge after hearing and report by the conciliation commissioner." (Set forth in full at page 4 of this brief.)

2. Mr. Byerly, the farmer debtor had no opportunity to prosecute error to the order of the District Court modifying the effect of Section 75 (o). He did not

earn of it until ten months after it was issued. Even if the order had been within the power of the District Court to issue, it was issued without due process of law as has been suggested at page 37 of this brief.

But no error proceeding was required. This court said in its decision of January 2, 1940, in *Kalb v. Feuerstein* at the bottom of page 7 of the court's printed decision:

> "Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer debtor. The protection of the farmers was left to the farmers themselves or to the Commissioners who might be laymen, and considerations as to whether the issue of jurisdiction was actually contested in the county court, or whether it could have been contested, are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this Act."

3. The nullity of the sheriff's sale results from Section 75 (n), (o) and (p). **Being a nullity, the State Court had no power to confirm it.** As this court said in *Shriver v. Lynn*, 43 U. S. (2 How.) 43 (discussed at page 35 of this brief): "The sale being without authority, the ratification of it by the court must be considered as having been given inadvertently. If given deliberately and on a full examination of all the facts, still it must be regarded as an unauthorized proceeding. There was no case before the court—nothing on which its judgment could rest. **No court, however great may be its dignity, can arrogate to itself the power of disposing of real estate without the forms of law.**"

Mr. Byerly's real estate title was never divested by the state court. He still has his right of redemption and he and it are subject to the federal jurisdiction under Section 75.

4. The Petitioner misconceives the question which is—not whether the State Court had jurisdiction when it presumed to confirm a nullity (the void sheriff's sale) but—whether that confirmation divested Mr. Byerly of his real estate. The State Court could not confirm a sale that never was held. **"No court, however great may be its dignity, can arrogate to itself the power of disposing of real estate without the forms of law."** An attempt to do so is *coram non judice* and is subject to collateral attack in any court at any time. It will be given no recognition by any court except to disregard it.

CONCLUSION

We suggest that the judgment of the Circuit Court of Appeals for the Sixth Circuit is not only correct but in conformity with the decisions of all Federal Courts which have considered the issue. The petition for certiorari ought to be denied.

Respectfully submitted,

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